



COVID-19

The case for mandatory vaccinations in the workplace

August 2021

In late July 2021 the federal and state governments agreed a four-stage National Plan to open up the economy and the broader community, and learn to live with COVID-19 for the foreseeable future. The final stage will be reached when more than 80 per cent of the population aged 16 and over is fully vaccinated. The Doherty Institute modelling on which the National Plan relies does, however, indicate that Australia still has some way to go to get out of the 'suppression stage' and into phase D open international borders, no lockdowns and management of COVID-19 consistent with influenza and other infectious diseases.

On the path to phase D the community will continue to endure on-going lockdowns and uncertainty which impacts our social and working lives as we increase our vaccination rates.

Here at Corrs, we have observed community sentiment noticeably shifting to an acceptance that Australia needs to move from an 'aggressive suppression' strategy to one where it will be necessary to live with the virus circulating, and managing this risk in part by high levels of vaccination and on-going non-pharmaceutical interventions (NPI)¹. Vaccines provide a way out from the deleterious impacts of on-going lockdowns. Importantly, they offer individuals protection from hospitalisation and death from COVID-19². Expert opinion also suggests that it is likely that vaccines offer some collective protection by significantly reducing transmission³.

With the federal and state governments either unwilling or unable to mandate vaccinations, many employers are addressing the question of what their organisations should be doing to support this critical community effort. If the threat of the Delta variant is constant and cannot be eliminated, as has been clearly demonstrated on the eastern seaboard of Australia over the course of this winter, employers are increasingly asking how they can manage the risk this presents not only to their employees but to their business, customers, clients, suppliers and the public at large.

One answer that is clearly gathering support is for employers to have the option to mandate vaccinations as a condition of employment. Previously, when considering this option many, including the Fair Work Ombudsman⁴ and Safe Work Australia⁵, formed the view that it was premature, particularly when in early 2021 when there was very little community transmission of the COVID-19 virus, and no evidence that the vaccine decreased the risk of transmission. Additionally, many pointed out that it doesn't make sense to mandate vaccinations when employees do not yet have access to a vaccine. Others have raised the emotive, but none the less one to be considered, issue of whether mandatory vaccinations may unreasonably impinge upon the rights and freedoms of the individual.

- 1 Non-pharmaceutical interventions are action apart from vaccination and medication that help slow the spread of illnesses. e.g.: social distancing, personal hygiene, etc. See <https://www.cdc.gov/nonpharmaceutical-interventions/index.html>
- 2 <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines/learn-about-covid-19-vaccines/how-do-covid-19-vaccines-work#how-will-a-vaccine-prevent-covid19>
- 3 <https://theconversation.com/mounting-evidence-suggests-covid-vaccines-do-reduce-transmission-how-does-this-work-160437>
- 4 The Fair Work Ombudsman released relatively conservative guidance on this topic on 26 January 2021. On 6 August 2021 their website advised that they will have "updated guidance" available soon. See: <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace>
- 5 See: <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/office/vaccination>

Fortunately, Australia is now just three months away from being in a position where most adults will have had access to an approved vaccine. At the same time, it seems likely that the virus will still be circulating throughout some parts of Australia for the foreseeable future. These factors impel a consideration of the need to strike a balance between individual freedoms and the common good.

In this new environment there is a pressing need for organisations to have clarity around the choices they want to make to support their own return to work efforts – and accelerate the path to societal and economic recovery – by supporting COVID-19 vaccination.

Employers will naturally prefer encouragement, persuasion and assistance, rather than coercion, as a basis for employees to access vaccination. But if this is insufficient, what options do employers have open to them? What are the objections to mandatory vaccination policies in the workplace? And more importantly, can these issues be addressed both from a legal and an ethical perspective?

In the great majority of cases, they can.

Set out below is our analysis of the principal issues that need to be addressed in the context of mandating vaccination of employees. In this context when we refer to ‘mandatory vaccination’ we are referring to compelling vaccination by direct or indirect consequences, and the imposition of restrictions in cases of non-compliance.

Despite the terminology, ‘mandatory vaccination’ is not truly compulsory in the sense that there is no force or threat of criminal sanction in cases of non-compliance. Each individual would retain agency over whether to receive a vaccine or not; but their choice may have implications for their ongoing employment on a temporary or continuing basis.

It is also important to recognise that typically, mandatory vaccination policies permit a limited number of legitimate exceptions – such, for example, as medical contraindications⁶.

Would it be a lawful and reasonable direction to require employees to receive a vaccine as a condition of employment?

In simple terms, all employees are under a contractual obligation to observe the lawful, reasonable directions of their employer.

For a direction to be lawful, it must be consistent with any employment contract, award or industrial agreement, and any Commonwealth, state or territory law that applies (for example, an anti-discrimination law). This is well established law in Australia. Importantly, a direction need not be required by law in order to be lawful. The test is that the employer’s direction not involve any contravention of a law, industrial instrument or employment contract. By the same token, the direction may well be necessary in order to enable the employer to discharge its legal obligations.

It follows from the foregoing that an employer does not need to establish that mandatory vaccination is *required* by health and safety laws. It does, however, need to be confident that giving such a direction is not contrary to such laws. This is an important and often misunderstood distinction.

We consider that in all but highly exceptional circumstances implementation of a mandatory vaccination policy would not be contrary to occupational health and safety laws.

What constitutes a ‘reasonable’ direction is less well-established than what constitutes a lawful direction. It is clearly not a matter that is to be determined in a vacuum. The nature of work and relationship are informative. Frequently, the reasonableness of directions has been considered in the context of implementation of health and safety policies.

Recent decisions of the Fair Work Commission (FWC) have confirmed that a direction to be immunised (against influenza) may constitute a lawful direction. In doing so, the Commission has found that such a direction is neither inherently discriminatory⁷ nor an assault or battery.⁸ It seems reasonable to assume that the Commission would adopt a similar position in relation to a direction to take a COVID-19 vaccine.

Employers can, therefore, have confidence that a direction to require a vaccination as a condition of work will normally be both lawful and reasonable.

⁶ A specific situation in which a drug, procedure, or surgery should not be used because it may be harmful to the person.

⁷ *Ms Maria Corazon Glover v Ozcare* [2021] FWC 2989 (26 May 2021) (Ozcare)

⁸ *Ms Bou-Jamie Barber v Goodstart Early Learning* [2021] FWC 2156 (20 April 2021) (Goodstart).

As has been recognised by the FWC, the significant duties on employers for the safety of their operations and the consequences for them if they fail to discharge that duty, weigh in favour of affording the employer a degree of discretion in determining how best to discharge its duty. Indeed, it has been observed that managerial prerogative “*should not be lightly curtailed*”⁹ in this regard, that it “*is not for the Commission to determine how [an employer] should organise its enterprise, or to find that the policy is unreasonable due to the presence of a potentially more favourable approach*”¹⁰

On the other hand, it is important to bear in mind that although a direction to take a COVID-19 vaccination is likely to be regarded as lawful and reasonable, and as such to constitute a ‘valid reason’ for termination for purposes of unfair dismissal claims, employers are still required to accord employees an appropriate level of procedural fairness before treating a valid reason as a ground for termination of employment. It is also important to bear in mind that disciplinary action short of dismissal can constitute ‘constructive’ dismissal if it is adjudged not to be reasonable in the circumstances. This is not to suggest that refusal to observe a mandatory vaccine direction cannot lawfully lead to termination of employment or other disciplinary action, but it is to emphasise the importance of observing appropriate standards of procedural, as well as substantive, fairness in such contexts.

The risk of COVID-19 in workplaces

Although safety and welfare considerations for all workers and workplace participants need to be balanced against the rights of individuals, the nature of the balancing process has changed dramatically in the past six months. Initially, the focus was on high risk environments, where the medical and safety advice has been that vaccines are necessary. Employers in these sectors including health and aged care had a clear path to mandate vaccinations.

Employers not in a medical or aged care environment now need carefully to consider whether the risk profile of their workplaces can objectively justify a reasonable and lawful direction to take a vaccination.

All employers have both statutory and common law workplace health and safety obligations. Compliance with these obligations is of course mandatory. But whether a mandatory policy for vaccinations is necessary to manage a workplace risk does not fully resolve the question of whether a direction is reasonable. As indicated earlier a direction may still be reasonable without being necessary.

In this context even though vaccination does not guarantee that the individual concerned will not contract the virus, or infect another person, the capacity to declare that all staff are vaccinated is likely to provide an employer with reliable comfort in the face of potential litigation, as well as a level of assurance to its clients as to its commitment to safety.¹¹

It seems obvious, but necessary, to point out that when the virus is circulating in the community and there is full and ready access to a vaccine then a fully vaccinated workplace will have a higher level of safety than a workplace with lesser rates of vaccination. If the health advice is that in such an environment, a workplace with 90 per cent vaccination will be safer than a workplace with 50 per cent vaccination, does this suggest an employer should mandate vaccinations? This might seem trite, but it must be recognised that this is the more likely scenario for Australia, given that the virus is likely to continue to circulate for some considerable time.

Surely, this is a scenario that needs serious, and informed, consideration by employers.

The counter-position is that other control measures (NPIs) could instead be used to manage COVID19 risks in the workplace; for example, the wearing of PPE, varied work patterns or locations, etc. But this would not in itself render a managerial decision to mandate vaccination unreasonable or unlawful.

For starters, the work health and safety laws require the risk of exposure to COVID-19 to be eliminated or minimised so far as is reasonably practicable. Applying this standard requires taking account of a range of factors, including the likelihood of exposure to COVID-19 occurring, the degree of harm that might result from that exposure, and the availability and suitability of ways to eliminate, or otherwise minimise, that exposure.

Further, business considerations are relevant to reasonableness in this context. If the business is likely to be a more attractive place for customers to visit if its workforce is fully vaccinated, or less prone to interruptions or forced shut downs, it is legitimate to take this consideration into account. The personal circumstances of employees are also relevant.

To date the focus has been on workplaces where employees interact with people with an elevated risk of being infected with COVID-19 (for example, employees working in hotel quarantine or border control), or employees who have close contact with people who are most vulnerable to the health impacts of COVID-19 (for example, employees working in health care or aged care). However, overseas experience suggests that when restrictions are eased and the virus is still circulating in the community, albeit at a socially acceptable level, most if not all workplaces will be susceptible to infection.

9 *Goodstart* at [344].

10 *Ibid.*

11 *Ozcare* at [249].

This year has shown that people have contracted the virus attending sporting events, at shopping centres, in offices and on construction sites.

These considerations suggest that it is likely that risk assessments will confirm the imposition of vaccinations to be reasonably practicable in the near future for many workplaces. In this context the medical advice that people who are vaccinated can still contract COVID-19 and therefore transmit the virus to others is an important consideration.¹² Even when an individual is fully vaccinated, they still have an interest in whether others are vaccinated.

The conversation around mandated vaccinations continues to evolve, and on August 12 the Fair Work Ombudsman updated its formal guidance to take a more robust view¹³. The updated guidance notes that a direction for employees to be vaccinated may be lawful and reasonable.

The guidance now identifies four “tiers” of work, where the case for directing employees to be vaccinated ranges from “more likely to be reasonable” (both “Tier 1” and “Tier 2”), to the lowest category of “unlikely to be reasonable” (“Tier 4”). The “Tier 1” category is where employees are required to directly interact with people at increased risk of being infected with coronavirus (eg border control). “Tier 2” is where employees have close contact with particularly vulnerable people (eg: health care, aged care). “Tier 3” is where there is likely to be interaction between employees and other people (eg: customers).

The guidance suggests that whether a direction to be vaccinated in this tier will be reasonable is more dependent on other surrounding circumstances, such as the level of community transmission in the area. The lowest “Tier 4” category, where the guidance suggests it is “unlikely to be reasonable”, is where employees have limited face to face interaction (eg: working from home).

This new guidance is helpful. Our view is however, unchanged. The great majority of workplaces will now need to consider the role of mandatory vaccinations in their workplace. And Tiers 1 to 3 cover a significant number of workplaces.

Is privacy a barrier to mandatory vaccinations?

No.

Privacy is a key consideration for employers but the privacy laws do not make unlawful a requirement to be vaccinated. The focus of our privacy laws concerns consent and the handling and retention of information. It is not unlawful in the context of a lawful and reasonable direction to be vaccinated for an employer simply to ask someone to provide evidence of their vaccination status. They may choose to refuse, but the mere asking is not of itself unlawful.

Australian government agencies and private sector organisations that collect, use and disclose personal information (including health information, such as vaccination status and history) must generally comply with the *Privacy Act 1988* (Cth) (**Privacy Act**), unless an exemption applies¹⁴.

We strongly advise employers have processes in place to comply with all requirements under the Privacy Act with respect to handing of the personal information of employees, contractors and visitors. The Office of the Australian Information Commissioner has produced guidance on this point¹⁵.

Requirement to obtain consent

First and foremost, employers must obtain the individual's consent prior to the collection of the vaccination information, which is “sensitive information” under the Privacy Act and subject to additional requirements. To obtain consent, employers must notify the employee or contractor (e.g. by way of a “privacy collection statement” or similar) of what sensitive information will be collected, the purpose of that collection, any third parties to whom the sensitive information may be disclosed, and whether the information will be transferred overseas.

This requirement applies regardless of the format in which the employer is collecting vaccination information – for example, by way of a formal vaccination certificate obtained by the individual from their doctor, or by receiving confirmation of an individual's vaccination status via the Commonwealth Government's recently released “COVID-19 digital certificate”¹⁶ or similar vaccination passport-type application.

We recommend obtaining consent from individuals as described above.

12 <https://www.health.gov.au/news/top-3-covid-19-vaccine-questions-lockdown-and-transmission-after-covid-19-vaccines-and-new-covid-19-strains> (as at 3 June 2021).

13 See: <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-workplace-rights-and-obligations#requiring-employees-to-be-vaccinated>

14 Some state government organisations are subject to different legislation, but often with similar obligations.

15 See the OAIC's guidance “Coronavirus (COVID-19) Vaccinations: Understanding your privacy obligations to your staff” released on 23 February 2021 at <https://www.oaic.gov.au/updates/covid-19-advice-and-guidance/>

16 See the Minister for Government Services' statement online at <https://minister.servicessaustralia.gov.au/media-releases/2021-06-09-new-covid-19-digital-certificate-simplifies-proof-vaccination>



Other restrictions on the collection of personal information

More generally, employers will also need to comply with a number of other requirements under the Privacy Act when collecting personal information (including sensitive information). These include:

- as mentioned above, taking reasonable steps to notify the individual at the time of collection of their personal information (or as soon as reasonably practicable thereafter) of certain prescribed matters (including, for example, the purposes for collection). This is typically done by providing the individual with a “privacy collection notice” at the time of collection (either in written or oral form);
- only collecting the minimum amount of personal information (including health information) reasonably necessary to prevent or manage the risk of COVID-19 in the workplace. The Office of the Australian Information Commissioner (OAIC) guidance states that if an entity has no specified use for vaccination information (e.g. the entity is recording that information on a ‘just in case’ basis), that collection is unlikely to be reasonably necessary¹⁷;
- not seeking to collect covertly or by unfair means. Additionally, under health records legislation in NSW and Victoria, the collection must not intrude to an unreasonable extent on the personal affairs of the individual and must not be undertaken in an unreasonably intrusive way; and
- the collection should be directly from the individual, unless it is unreasonable or impracticable to do so.

Do you need to collect vaccination information in a particular way (e.g. via a “vaccination passport” application)?

At this point there is no law or other strict requirement which requires employers to collect vaccination data in a particular way, provided that the employer complies with the requirements under the Privacy Act outlined in this article. However, employers should consider which method will best protect the security and confidentiality of the individual’s health information to the extent the information needs to be stored (see below for further information in relation to the storage and deletion of vaccination information).

Storage and deletion of vaccination information

The Privacy Act requires that entities who hold personal information take reasonable steps to protect that information from unauthorised access or misuse. What is “reasonable” depends on the circumstances, including the sensitivity of the personal information being held by that entity.

As such, employers should ensure that the systems that they are using to store vaccination information in relation to their employees and contractors is secure, and that appropriate security features are in place to limit access to the data.

Employers should also take steps to destroy or de-identify any personal information (including health information) that is no longer needed for the purposes for which it was collected (that is, the purposes notified to the individual at the time of collection), to minimise the risk of unauthorised access to or use of such information in the future.

17 See the OAIC’s guidance “Coronavirus (COVID-19) Vaccinations: Understanding your privacy obligations to your staff” released on 23 February 2021 at <https://www.oaic.gov.au/privacy/guidance-and-advice/coronavirus-covid-19-vaccinations-understanding-your-privacy-obligations-to-your-staff/>

Is it unlawful discrimination to require a vaccine?

There will, of course, be employees who cannot receive a vaccination for legitimate reasons, including medical considerations (e.g. allergies, other medical conditions and anxiety disorders). An employee who has a medical condition which prohibits receipt of the vaccine is likely to be considered to have a 'disability' which will be a protected attribute under Federal and State anti-discrimination law.

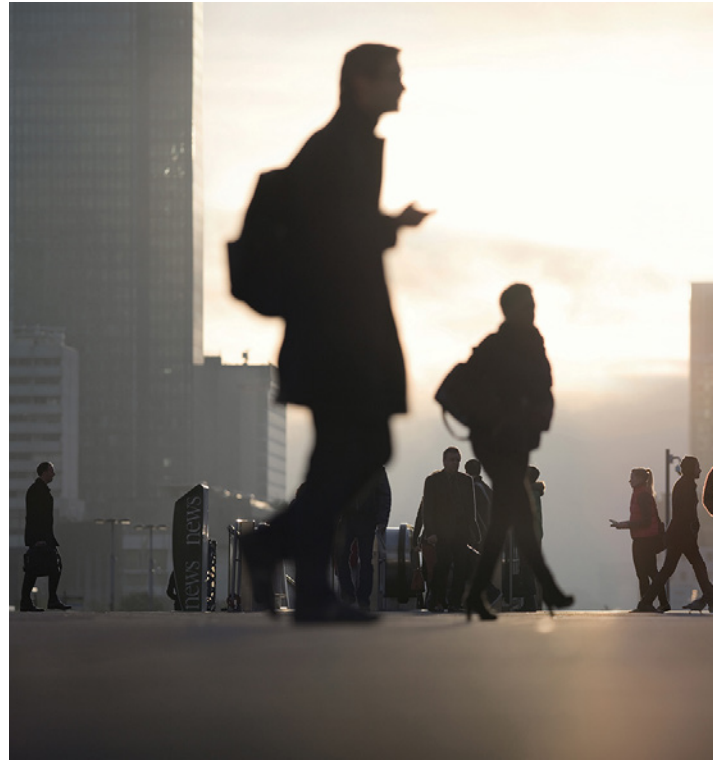
Federally, the *Sex Discrimination Act 1984* (Cth) (**SDA**), the *Disability Discrimination Act 1992* (Cth) (**DDA**) and the *Age Discrimination Act 2004* (Cth) (**ADA**) make it unlawful to discriminate on the grounds of pregnancy, disability and age in many areas of public life, including in employment. 'Disability' is broadly defined in the DDA and includes past, present and future disabilities, as well as imputed disabilities.

A strict rule or condition that mandates COVID-19 vaccinations for all staff, that does not take into account the situation for people with certain disabilities, medical conditions or who are pregnant, may lead to conduct that 'indirectly discriminates' contrary to the provisions in the SDA, the DDA and the ADA. So any mandatory policy needs to be drafted to take this risk into account.

If a person's reason for not wanting the vaccine is not linked to a protected attribute then this would not be discrimination.

There are also express duties under anti-discrimination legislation to make 'reasonable adjustments' for people with a disability at the workplace. Such an adjustment might include permitting the employee to work remotely, at different times of day or to implement stricter control measures to ensure their safety in the workplace.

Reasonable adjustments can be resisted on the grounds that they would impose an unjustifiable hardship on the employer (for example, that the cost of an adjustment would be prohibitive). However, an unjustifiable hardship defence is a high bar, not one that will be easily met and is not available in all jurisdictions.



In some state and territory jurisdictions, it may also be unlawful to discriminate on the basis of a person's religious belief or activity.¹⁸ There is also some protection for employees and others against discrimination on the basis of religion in the 'general protections' provisions of the *Fair Work Act 2009* (Cth).¹⁹ Few of the larger or mainstream religions appear to be opposed to COVID-19 vaccinations, but some smaller religious groups are opposed. Depending on the relevant jurisdiction, employers may need to accommodate genuine religious objections to vaccination, or risk facing a successful equal opportunity complaint against them.²⁰ However it seems likely that only a very small percentage of employees will be opposed to vaccination on the basis of religion.

It would generally be prudent actively to engage with unvaccinated employees who are concerned about being in the workplace, in order to understand the nature of their concerns and how they can be accommodated. For example, if an employee cannot be vaccinated because they have a pre-existing medical condition, and that medical condition also makes them more susceptible to COVID-19, or they hold a genuine religious belief against vaccination, adjustments such as permitting the employee to work remotely could be reasonable.

Properly managed an employer can ensure that a mandatory vaccination policy can be implemented without breaching discrimination laws in Australia.

¹⁸ See summary provided by the Australian Human Rights Commission, "Quick Guide - Religion," at <https://humanrights.gov.au/quick-guide/12091>

¹⁹ Section 351, *Fair Work Act 2009* (Cth)

²⁰ For example, see the publication of the Equal Opportunity Commission of Western Australia "Fact Sheet – Religious Conviction Discrimination"; at <https://www.wa.gov.au/government/publications/equal-opportunity-commission-fact-sheet-religious-conviction-discrimination>

Consultation

In many instances, employers will be under consultation obligations regarding the introduction of a mandatory vaccination policy. These obligations can arise under both workplace health and safety and industrial laws.

Workplace health and safety regimes require employers to consult with employees and their health and safety representatives about plans to implement policies on safety matters. This is likely to include a policy regarding vaccinations. A reasonable time period for this consultation is necessary to allow views to be expressed and considered.

Similarly, many employers will be covered by either an award, enterprise agreement or another registered industrial agreement which will have a consultation clause requiring employers to consult with employees and any representatives when an employer intends to implement significant workplace changes. Again, employers will need to comply with these obligations and time must be set aside to do so.

In summary

The potential problems that have been raised in relation to mandatory vaccination policies can successfully be addressed. In sharing our thoughts we appreciate that not all employers will want to implement a mandatory policy at this time. There are issues beyond the lawfulness of such a policy that will be front of mind for employers. Encouraging employees rather than mandating employees is likely to be favoured by most employers.

It makes sense if you are considering mandating vaccinations or offering incentives to have a policy that addresses various issues that arise. One purpose of the policy would be to explain the incentives being offered and the exceptions or nuances that may exist for accessing the incentive.

We encourage all employers to consider the options available to them as this issue will continue to grow in importance and the timeframe for decision-making in a pandemic is, as we know, very short.



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